NO. 22615

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM NEIL TURNBULL,	)
	)
Plaintiff-Appellant,	)
	)
vs.	)
	)
JOSEPHINE BONKOWSKI and LEONARD KING,	)
	)
Defendants-Appellees.	)

CHARLES J. CLASBY
P. O. Box 1368
First National Bank Building
Fairbanks, Alaska 99701

Area Code 907, 452-2153

I N D E X

TABLE OF CASES

STATUTES

Computation of Time: "The time in which an act provided by law is required to be done is computed by excluding the first day and including the last, unless the last day is a holiday, and then it is also excluded." (Section 01.10.080, Alaska Statutes; C.L.A. 1933, Section 3275) 4,5,7

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BRIEF OF DEFENDANTS-APPELLEES

Statement of Jurisdiction

The Defendants-Appellees adopt Plaintiff-Appellant's Statement of Jurisdiction.

Statement of the Case

The Defendants-Appellees adopt Plaintiff-Appellant's Statement of the Case as to the allegations of the complaint and the fact that summary judgment was entered by the District Judge on November 17, 1967.

Argument

I. In determining the period of disability relating to the age of a minor in Alaska, the common law rule prevails.

This is an action for personal injuries, and the applicable statutes are as follows:

First, the Alaska statute of limitations pertaining to tort actions, §09.10.070, Alaska Statutes, provides:

> "No person may bring an action ... for any injury to the person or rights of another not arising on contract ... unless commenced within two years." (Emphasis added)

At the time of the alleged injury, plaintiff was a minor, and the above statute was, therefore, tolled as provided in §09.10.140, Alaska Statutes:

> "If a person entitled to bring an action ... is at the time the cause of action accrues ... under the age of 19 years ... the time of the disability is not a part of the time limited for the commencement of the action. But the period within which the action may be brought is not extended in any case longer than two years after the disability ceases."

As stated in Plaintiff-Appellant's brief on appeal, plaintiff, William Neil Turnbull was born on January 25, 1945. The complaint in this case was filed in the Illinois Court on January 25, 1966, which was plaintiff's twenty-first birthday. Under the common law rule, which was found by the District Court Judge to be the law of Alaska, plaintiff had until midnight, January 24, 1966, to file this case in

compliance with the above statutes, as, under Alaska law, his disability was removed upon becoming 19 years of age. (See: A.S. §09.10.140).

The common law rule regarding the computation of age, simply stated, is that the day of a person's birth is included so that a given age (here 19 years) is attained on the day before his birthday anniversary. As stated in American Law Reports Annotation, 5 A.L.R.2d 1143, the origin of this rule is unknown, but its existence is shown in English cases dating back to the Seventeenth Century. The rule is evidently premised upon the fact that the law does not recognize fractions of a day, and can hardly deny "existence" on the day of birth. As stated in U. S. v. Wright, 197 F. 297, 298 (1912, 8th Circuit):

> "The law ordinarily taking no cognizance of fractions of days, one becomes of full age the first moment of the day before his twenty-first anniversary."

The logic of the rule in computing age is particularly clear when considering fractions of days since there can be no denying that any moment of birth on a given calendar day marks that entire day with absolute certainty as the first in a person's existence. There can be no reason for

exclusion of the day. As stated by the court in People v. Board of Education of City of Chicago, 343 Ill. App. 382, 99 N.E.2d 592, 594 (1951):

> "... Plaintiff admits that the law is well established that a person attains a given age on the day prior to his birthday anniversary, but argues that this was an interpretation of the law made only for the purpose of preserving the rights of the parties involved, not to destroy them. As we have stated, what is here involved is an administrative rule. Whatever may have been the historical origin of this method of determining age, it has become stare decisis now and is applied to all manner of situations." (citations omitted)

As elsewhere, this rule relating to age computation should be and is the Law of Alaska.

II. The Alaska statute relating to the computation of time within which an act must be done has no bearing on the common law rule regarding age.

Plaintiff-Appellant cites Alaska Statutes, §01.10.080, which states:

> "The time in which an act provided by law is required to be done is computed by excluding the first day and including the last, unless the last day is a holiday and then it is also excluded."

As correctly pointed out neither January 24 nor January 25, 1966, were holidays. Plaintiff maintains that this statute

should govern the computation of the time period during which plaintiff was disabled as a minor from filing his complaint in this case as provided by §09.10.140, Alaska Statutes. Defendants do not believe that this was the intent of the legislature in promulgating this statute. To so hold would be in complete derogation of the common law rule respecting age set out previously. As pointed out by the court in Lowe v. Hess, 10 Alaska 174 (1941) in interpreting Section 3275, Compiled Laws of Alaska, 1933, which is identical to the present §01.10.080, Alaska Statutes, quoted above, this section merely states the common law. How then can it be in derogation of the common law rule regarding age?

Calculation of the time of majority is not within the purview of the statute. This question was squarely dealt with by the Minnesota Supreme Court in Nelson v. Sandkamp, 34 N.W.2d 640, 642, 5 A.L.R.2d 1136 (1948), where the court states:

> "As already noted, plaintiff was born October 21, 1923, and reached his 21st anniversary on October 21, 1944. Where the common law prevails, the general rule for the computation of time is to exclude the first and include the last day. ...

For over 200 years, the common law has, however, recognized a remarkable exception to the foregoing rule, to the effect that in computing a person's age the day upon which that person was born, even though he was born on the last moment thereof, is included, and he therefore reaches his next year in age at the first moment of the day prior to the anniversary date of his birth. ... This exception has become so well established over a long period of time that it has attained an independent status of its own. Our computation-of-time statute, ..., is but declaratory of the general common-law rule. ... A declaratory or expository statute is one which has been enacted in order to put an end to a doubt as to what is the common-law--or the meaning of another statute--and which declares what it is and ever has been. Clearly, §645.15 is expressive of only the general common-law rule and does not presume to abrogate the well-established exception thereto governing the computation of a person's age. If we were to hold otherwise, the statute would be in derogation, and not merely declaratory, of the common law, and as such it would require a strict construction which would reasonably and necessarily exclude its application to the exception. ... A declaratory act is, of course, not to be confused with a remedial statute, which is intended to alter or cure a defect in an existing rule of law. ... It follows that §645.15 has no application in calculating a person's age. The prevailing rule, therefore, governs in this jurisdiction, and in computing a person's age, the day of his birth is included, and he becomes of age on the

> first instant of the day preceding his 21st anniversary. Plaintiff herein, having been born on October 21, 1923, became 21 years of age on the first moment of October 20, 1944, and consequently his disability ceased on the last moment of October 19." (citations omitted)

Clearly §01.10.080, Alaska Statutes, deals with the computation of time for the doing of an act from the happening of an event such as the occurrence of a personal injury. This is applicable to the two-year limitation; but not to a determination of when the "event" occurred. The "event" is the day (here) upon which plaintiff completed 19 years of existence, obviously the day before the celebrated 19th anniversary of his birth.

III. Some jurisdictions have held that the first day after a period of disability should be included in computing the subsequent running of a statute of limitation.

This method of computing time is covered in §4, 20 A.L.R.2d 1255. In the instant case this would mean that the first day of plaintiff's majority would be included in the two-year limitation period making the last day on which the action could be filed January 23, 1966. The reasoning for this additional shortening by one more day would seem to

be that following a period of disability, it is no longer purposeful to exclude the first day and include the last day in computing time, i.e. as for a period of limitations. This is because a person has the entire day preceding the anniversary of his majority in which to file suit, whereas, in the case of an injured adult, there may only be a fraction of the day of the injury in which to file. See: Phelan v. Douglas (1855) 11 How. Pr. 193, and Taylor v. Aetna Life Ins. Co., 49 F. Supp. 990 (1943 D.C., Texas).

Where a statute, such as the one we have in Alaska, provides for the computation of time by the exclusion of the first day and inclusion of the last, the above-noted method may not be considered applicable. It certainly should be considered, however, as convincing of the proposition that the law does not recognize fractions of days and the reasoning therefore; and, lastly, as showing how deeply entrenched in the law is the common law method of determining a person's age.

Conclusion

For the reasons set out above, Defendants-Appellees respectfully urge this Court to affirm the judgment of the District Court appealed, thereby allowing the summary judgment granted below to stand.

Respectfully submitted,

CHARLES J. CLASBY
P. O. Box 1368
First National Bank Building
Fairbanks, Alaska 99701

Area Code 907, 452-2153

Attorney for Defendants-Appellees

ATTORNEY'S CERTIFICATION

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

CHARLES J. CLASBY, Attorney